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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-1249

MARTIN SKLAROFF and JESSE SKLAROFF
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

The Petitioners, MARTIN SKLAROFF and JESSE SKLAROFF, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 17, 1975.

OPINION BELOW

The opinion rendered in this matter by the United States Court of Appeals for the Fifth Circuit, reported at 506 F.2d 837 (5th Cir. 1975), appears in the Appendix hereto and is designated as Appendix "A".

The petition for rehearing filed by the Petitioners was denied on March 4, 1975. A copy of said denial of the petition for rehearing is attached hereto as Appendix "B". A motion staying the issuance of the mandate was granted on March 18, 1975. Copies of the orders staying the mandate are attached hereto as Appendix "C" and "D". The opinion rendered by the District Court in and for the Southern District of Florida in the case is reported at 323 F.Supp. 296 (S.D. Fla. 1971)*

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on January 17, 1975. A timely petition for rehearing was denied on March 4, 1975, and this petition for certiorari was filed within 30 days of that date. The Court's jurisdiction is invoked, under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

First Amendment to
The Constitution of the United States

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free

*Due to the length of the said opinion, comprising 31 pages, and since it is reported, it is not set forth herein as an Appendix.

exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourt Amendment to
The Constitution of the United States

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to
The Constitution of the United States

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

*Title 18, United States Code,
Sections 2516(1) and 2518(1), (4) and (8)(a)

§ 2516(1) Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216

§ 2518(1), (4) and 8(a) Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

*Chapter 119 is set out in its entirety in the Appendix hereto and designated as Appendix "E".

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communications under this sub-section shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218.

QUESTIONS PRESENTED

I

Whether a ruling in direct conflict with that of another Circuit which sanctions the absence of a commencement date on a wiretap order issued pursuant to Title 18, United States Code, Section 2518, violates Title 18, United States Code, Section 2518(4)(e).

II

Whether the Petitioners were denied due process of law and the intent of Congress underlying the promulgation of Chapter 119 was thwarted by the cumulative effect of the numerous violations of Chapter 119 in the wiretap application and order in the case sub-judice.

III

Whether Chapter 119, Wire Interception and Interception of Oral Communications, Title 18, United States Code, Sections 2510-2518, is unconstitutional in violation of the First, Fourth and Fifth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On June 17, 1969, an application was submitted to Judge William O. Mehrtens, District Court Judge for the Southern District of Florida, seeking an order allowing the interception of wire communications of the Petitioners. The application for the order was presented by William G. Earle, an Assistant United States Attorney and was

predicated on an attached authorization from Will Wilson, the Assistant Attorney General in charge of the Criminal Division. The application relied upon and had attached to it an unsworn statement purportedly being an affidavit from an FBI agent. The Court entered its order granting the requested interception for a period of seven days from the date of the order, but did not date the order.

As a result of this wiretap, on the 25th day of March, 1970, the Petitioners were charged by Indictment, along with others, with violations of Title 18, United States Code, Section 1084. They entered pleas of not guilty and filed pre-trial motions, including a Motion to Suppress and Supplemental Motion to Suppress. The cases came on for trial before the Honorable Ted Cabot, District Judge, on May 24, 1971. Petitioners were found guilty by the jury and post trial Motions were heard and denied by the Court. The Petitioners then filed their Notice of Appeal to the Fifth Circuit Court of Appeal.

Also as a result of this wiretap, the Petitioners had been Indicted in the Northern District of Georgia on March 3, 1970, and charged with violations of Title 18, United States Code, Section 371 and 1084. After pre-trial Motions had been filed, including a Motion to Suppress, the case came on for trial before the Honorable Newell Eddenfield, District Judge. The Petitioners were found guilty of certain counts of the Indictment by the jury and, after post trial Motions were denied, they filed their Notice of Appeal. The two above cases were consolidated for purposes of appeal to the Fifth Circuit Court of Appeal and are jointly presented in this petition.

REASONS FOR GRANTING WRIT

I

THAT THE FAILURE OF A TRIAL JUDGE TO DATE A WIRETAP ORDER DIRECTLY VIOLATES TITLE 18, UNITED STATES CODE, SECTION 2518(4)(e) AND THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS HEREIN CONFLICTS WITH AN OPINION ON THE SAME ISSUE RENDERED BY THE SIXTH CIRCUIT COURT OF APPEALS.

The Petitioners submit that the trial court's order authorizing and approving the interception of their wire communications in the instant case was legally insufficient in that the date of the order's entry was omitted. Title 18, United States Code, Section 2518(4) clearly sets forth the mandatory specifications which must be contained in any interception order. By the omission of the date it was issued, the order in the instant case fails to meet the mandatory requirements of Section 2518(4)(e). As a further result of the failure of the order to include the date it was entered, the period of time during which the interception was authorized became vague and ambiguous and thus the order on its face did not meet the specificity requirements of *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967); and *Osborn v. United States*, 385 U.S. 323 (1966).

The portion of the interception order which fails to satisfy the Congressional scheme requiring a specific period of time during which the interception is authorized reads as follows:

"B. Such interception to continue for a period of seven days from the date of this order or until communications shall have been intercepted which reveal the exact manner and extent to which Martin Sklaroff and Jesse Sklaroff receive and give out line information assisting in the placing of bets or wagers on a sporting event or contest, whichever date is earlier.

"PROVIDED THAT, this authorization to intercept wire communications shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications that are otherwise not subject to interceptions under Chapter 119, Title 18, United States Code, and must terminate upon the attainment of the authorized objective or, in any event, at the end of seven days from this date.

"DONE and ORDERED at Miami, Florida this 17th day of ."

"/s/ W. O. MEHRTENS

UNITED STATES DISTRICT JUDGE"

As is evident from the order as set forth above, it authorized interception for a period of seven days from its supposed signing. However, *the order did not contain the month or year it was signed.*

In a wiretap order, the number of days the interception is issued determines the scope of the search and seizure. Thus, since the search and seizure herein (wire

interception) was to begin the day the order was signed and end seven days from that date, the extent and scope of the search herein lacked constitutional particularity.

Title 18, United States Code, Section 2518(4)(e) provides that "*the period of time during which such interception is authorized shall be specified in the order*". This requirement is not merely to instruct the agents when to execute the order, but in fact, determines the scope of the search. "Nothing is to be left to the discretion of the officers executing the order" *Marron v. United States*, 275 U.S. 192 (1927). "[S]earches by eavesdrop must be confined in time precisely as the search for tangibles is confined in space, ..." (*Berger v. New York*, 388 U.S. at 100) (Harlan, dissenting).

It cannot be gainsaid that the provision in the order that the interception of communications must terminate at the end of "seven days' from this "17th day of _____" is without any legal force and effect. Certainly, no Court would not entertain an appeal from a final judgment reciting that it was entered "this *17th* day of_____" or that the judgment shall become final "seven days" from this "*17th* day of _____", for the simple reason that the Court would be unable to ascertain from the judgment or for that matter from a docket entry "*17th* day of _____" when the time begins to run to take the appeal. Notwithstanding, in a matter where government agents are permitted by Court order to intercept wire communications and where such orders must specify the period of time during which such interception is authorized, the Fifth Circuit holds valid, without opinion, an order which does not specify when the time period begins to run.

The position adopted by the Fifth Circuit Court of Appeals herein on this issue is in direct conflict with the Sixth Circuit Court of Appeals. In *United States. Lamonge*, 458 F.2d 197 (6th Cir. 1972), the Sixth Circuit adopted the argument espoused herein by the Petitioners. In *Lamonge, supra,* the Sixth Circuit held that the absence of a date on an interception order makes its duration unlimited by its own terms and thus makes the order invalid on its face. In so ruling, the Sixth Circuit Court of Appeals concluded that the omission of the date that a wiretap order was issued thereby authorizes the wiretap for an unreasonable length of time. This renders the order invalid since it contravenes the mandate of *Berger v. New York, supra.*

Further, the court in *Lamonge, supra,* specifically rejected the position taken by the trial judge herein that the defect could be cured by adding the date of issuance to the order, Nunc Pro Tunc. In rejecting this contention, the court held that "the assertion that the date was added Nunc Pro Tunc did not change the fact that the wiretap authorizations were on their face invalid at the time they were used." (*United States v. Lamonge*, 458 F.2d at 199)

To allow matters dehors the order to supplement a critical and essential deficiency on the face of the order is to permit Federal agents, rather than a District Judge, the right to complete the order in question. Adherence by the Courts to the mandatory requirements of the wire interception statutes will further the cause of justice far more than excusing disobedience of the Congressional scheme, albeit unwitting disobedience.

II

THAT THE PETITIONERS WERE DENIED DUE PROCESS OF LAW AND THE INTENT OF CONGRESS UNDERLYING THE PROMULGATION OF CHAPTER 119 WAS THWARTED BY THE CUMULATIVE EFFECT OF THE NUMEROUS VIOLATIONS OF CHAPTER 119 IN THE WIRETAP APPLICATION AND ORDER IN THE CASE SUBJUDICE.

The Petitioners submit that the totality of prejudice caused by the numerous violations of Chapter 119 in the wiretap application and order herein clearly thwart the Congressional intent that electronic eavesdropping be confined within narrow bounds under strict judicial supervision. *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Bernstein*, ____F.2d____; 16 Cr.L. 2421 (4th Cir. 1975).

A. Interception Order Granted for Telephone Numbers Not Authorized. [Violation of 18 U.S.C. 2516(1) and 2518(1)(b)(ii),(iii)]

The application filed by Mr. William Earle to obtain an order allowing an interception of the communications on the Petitioners' phones, telephone numbers 691-9561 and 691-9797, was not authorized by Will Wilson, Assistant Attorney General in charge of the Criminal Division. Mr. Wilson, in his letter of authorization to Mr. Earle, authorized Mr. Earle to apply for an interception order on four telephones carrying the following numbers: 691-9981, 691-9528, *691-9566* and *961-9797*.

The application Mr. Earle filed requested an order to intercept communications from telephones carrying the numbers *691-9561* and *691-9797*. The application requesting the interception for these particular numbers was without any authorization from Will Wilson and thus, the order to intercept communications on these said numbers was improper as a matter of law in that it violated the provisions of Title 18 United States Code, Section 2516(1) and Section 2518(1)(b)(ii), (iii).

The Petitioners submit that since there existed no authorization by Assistant Attorney General Wilson for the application to intercept the telephone numbers 691-9561 and 691-9797 the communications from those facilities and evidence derived therefrom should have been suppressed by the trial court.

B. Application Defective — No Sworn Affidavit [Violation of 18 U.S.C. 2518(1)]

The application filed by William Earle upon which the order of interception in the instant case was predicated was defective as a matter of law since it relied on an unsworn statement to establish probable cause.

It is clear that the so-called affidavit and supporting documents submitted by the Assistant United States Attorney along with the application, and which were relied upon by the Court in reaching the findings for its order, were not supported by oath or affirmation as required by the Fourth Amendment to the Constitution of the United States and the provisions of Title 18, United States Code, Section 2518(1). The Petitioners submit that when entering the order in the instant case, the Court acted merely

as a rubber stamp for the Justice Department when it is considered that the affidavit was unsworn. "The constitutional requirement that no search warrants 'shall issue but upon probable cause supported by Oath or affirmation' is not to be cavalierly brushed aside as an empty formality." *Dow v. Baird*, 389 F.2d 882, 884 (10th Cir. 1968).

Since the "affidavit" submitted by Agent Sharp was the entire documentation upon which probable cause was found by the Court, the fact that it was not sworn to is of paramount importance and cannot be disregarded as a meaningless technicality.

C. Fourteen Days Delay in Delivery of Intercepted Conversations [Violation of 18 U.S.C. 2518(8)(a)]

Title 18, United States Code, Section 2518(8)(a) provides that "*immediately upon the termination of the interception, the recordings must be made available to the Judge who issued the order and sealed.*" (See Senate Report 104) In the instant case the recordings, the order of authorization, the application, Sharp's statement and the supporting documents were not made available to the Court until July 8, 1969, fourteen days after the interceptions had terminated.

The procedure required by Chapter 119 is an attempt to safeguard the identity, physical integrity and contents of the recordings to assure their admissibility in evidence as mandated by *Berger v. New York*, 388 U.S. 41, at page 60 (1967).

Although the Senate Report mentions the power of the Judge to enforce the provisions relating to return by the contempt power of the Court, it is submitted we will see the same kind of enforcement here that we saw when agents of the Federal Bureau of Investigation and Internal Revenue Service conducted illegal searches and wire tapping prior to the enactment of Chapter 119. No government agent has ever been prosecuted for a violation of Title 47, U.S.C. Section 605, and we submit that none will ever be held in contempt for not properly making a return. The only way to enforce the return requirements contained in Chapter 119 is to suppress the contents of the communications, thereby establishing an exclusionary rule which will force the government to follow the dictates of Chapter 119.

D. Guidelines Needed Now

The Petitioners submit that the procedural errors and violations of Chapter 119 reflected herein will be repeated time and time again by the law enforcement agencies using the eavesdropping provisions of Chapter 119. It is imperative that this Honorable Court set forth guidelines now as to the procedure to be followed since the same provisions of Chapter 119 which are in contention here will be frequently used in the future by law enforcement agencies and subjected to judicial scrutiny.

III

THAT CHAPTER 119, WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS, TITLE 18, UNITED STATES CODE, SECTIONS 2510-2518, IS UNCONSTITUTIONAL IN VIOLATION OF THE FIRST, FOURTH and FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Fourth Amendment Violations

1. Continuous Intrusion

Under the principles announced by the Supreme Court in *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967), and *Osborn v. United States*, 385 U.S. 323 (1966) Chapter 119 is clearly constitutionally unsound with respect to the duration of the eavesdropping authorized thereunder.

Chapter 119 authorizes eavesdropping for potentially unlimited periods of time. Section 2518(5) of Chapter 119 permits eavesdropping for an initial period of 30 days with an unlimited number of 30 day extensions on renewed showings of probable cause. The allowance under 2518(5) of such lengthy surveillance, possibly for years, conflicts sharply with *Berger's* clear disapproval of the two months authorization permitted by the New York Statute.

The thirty day time limit in Chapter 119 clearly is too broad, continuous and unrestrictive. Since in *Berger*, a two month period was too great on its face because "it is the equivalent of a series of intrusions, searches and

seizures, pursuant to a single showing of probable cause" (388 U. S. at 59), what characteristics of a one month limitation are there that removes this danger? The Petitioners submit there are none and that the constitutional defects inherent in the 60 day period remain in the 30 day period.

Moreover, Section 2518(1)(d) and (4)(e) of Chapter 119 do not limit the eavesdropping to specific points in time, unlike the court orders upheld in *Katz* and cases approvingly cited in *Berger* (388 U.S. at 63), but rather allow uninterrupted eavesdropping over a "period of time". Under these provisions, the Government may install a tap or a "bug" which will be in *continuous* operation throughout the days or months for which the interception is authorized. (Whether the Agents intercept for the full 24 hours or for lesser periods is immaterial to a determination of the constitutionality of the statute on its *face.*)

This authorization for continuous operation of the tap or bug is in direct contradiction to the Supreme Court's holding in *Berger*, which disapproved the uninterrupted interception as allowing "indiscriminate" seizure, and which approved the *Osborn* interception because "the order authorized one limited intrusion rather than . . . continuous surveillance . . ." (388 U.S. at 57). See also *The Supreme Court*, 1967 Term, 82 Harvard Law Review 63, 195-196 (1968). Professor Robert G. Blakey of Notre Dame Law School, the principal draftsman of the bill and of the ABA Standards Relating to Electronic Eavesdropping interprets *Katz* as allowing authorization for interception of a "single phone call." Tentative Draft, *ABA Standards Relating to Electronic Surveillance*, page 148 (June 1968). Chapter 119 however allows a "Roving Com-

mission" to seize any and all conversations. Swartz, 67 Mich. L. Rev. 455, 458, 459 (Jan. 1969).

There can be no question when the *Berger* and *Katz* opinions are read together, that this Honorable Court intended to set out in them an absolute Fourth Amendment protection for "what [a person] seeks to preserve as private" (389 U.S. at 351) and an absolute proscription of "general warrants" which leave "too much to the discretion of the officer executing the order" (388 U.S. at 59). See *Entick v. Carrington*, 19 How. St. Trials 1039 (1765); *Boyd v. United States*, 116 U.S. 616 (1886); *Harris v. United States*, 331 U.S. 145, 157, 158 (1947). "The provenance of the Fourth Amendment bears on its scope." (Frankfurter dissent) See generally Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937). Despite the requirements of the application procedure as set forth in Section 2518, Chapter 119, on its face still permits unrestricted wire tapping or eavesdropping for 30 days, renewable, in effect, by mere presentation of the prior "probable cause". By not binding state and federal officers to the concepts of "automatic termination when the described communication has been first obtained" (see Chapter 119, Section 2518 (1) (d) and (4) (e) and "one limited intrusion" (388 U.S. at 57), Chapter 119 *creates the very evil found in the New York Statute in Berger*, in that:

> "During such long and continuous (24 hours a day) periods, the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection to the crime under investigation." 388 U.S. at 59

Nor does the language required to be placed in the Judge's order that the authorized interceptions "shall be executed as soon as practicable" (Section 2518(5), or even the remedy of suppression, (2518)(10)(a), really offer adequate assurance that the government will not overhear enumerable conversations to which they have no business or right. The executing officers must listen to all calls at least in part to determine if they relate to the authorized objective in the order.

The possibility of a warrant authorizing a number of interceptions under Chapter 119 squarely conflicts with *Berger*. In *Berger*, the court seemed to require that each order be limited to one interception; in disapproving a "series of intrusions, searches and seizures, pursuant to a single showing of probable cause" (388 U.S. at 59). The *Berger* court's implied approval of *Osborn*, where the FBI had obtained a new order for a second interception made only a day after the original interception, reinforces this interpretation of *Berger*. Further, even the "narrowly circumscribed" surveillance over a period of days that was approved in *Katz*, is a far cry from the continuous series of intrusions, possibly lasting for years, authorized by Chapter 119.

2. Lack of Particularity

As stated by Justice Clark in his opinion in *Berger*, the inherent obtrusiveness of eavesdropping makes "the need for particularity especially great". *Berger v. New York*, 388 U.S. at 56 (1967). (Impliedly approving *Stanford v. Texas*, 379 U.S. 476, 485 (1965) requiring a scrupulous exactitude in the warrant where confiscation of books was concerned because of the First Amendment implications of such seizure.)

In view of the possibility of the long term eavesdropping authorized by Chapter 119, *Berger's* requirement that the "property sought", i.e., the conversation, be described with particularity in the warrant becomes all the more important. The need for particularity which was lacking in the statute and the warrants that were condemned in *Berger* had previously been emphasized by the Supreme Court in *Osborn v. United States*, where it was found that the type of conversation was so described with particularity, that "the officers could not search unauthorized areas."

The Supreme Court's subsequent decision in *Katz* underscored its concern for particularity by approving, in dictum, an extremely narrow intrusion. The Fourth Amendment's particularity requirements, as stressed by this Court in its previous decisions, is contravened by the provisions of Chapter 119. A strict particularity requirement would exclude two types on non-specified evidence: undescribed evidence of the crime being investigated, *(Marron v. United States*, 275 U.S. 192, 196 (1927), and evidence of other crimes, *(Seymour v. United States*, 369 F.2d 825 (10th Cir., 1966). Chapter 119 does not exclude either kind of evidence.

As to the non-specified evidence of a specified crime, Sections 2518 (4) (c) and (e) require a description of the "*type of communication sought to be intercepted.*"

In view of the concern of this Court with particularity of description in the warrant, "type of communication,,' must be construed narrowly. Justice Clark's statement that the "need for particularity is especially great in the case of eavesdropping" may be explained by his citations there-

after of *Osborn*, *Goldman*, *Lopez* and *On Lee*, as examples of specificity, for, as the description in the accompanying footnote denotes, all four cases involve quite detailed advance knowledge and descriptions of the anticipated contents of the conversation of the crime and persons involved, and of the places and time of interception. *Katz* also reflects a meticulous construction of the particularity requirement.

Even reading Chapter 119 narrowly, the statute still violates the particularity requirement of the Fourth Amendment in that it still allows the police to listen for all conversations that fit the description of the type specified in the order. This certainly seems to be less than the kind of particularity that is impliedly required by *Berger* and *Katz*. Moreover, Chapter 119 seems to allow the interception of conversations about non-specified offenses. Section 2517 (5) expressly permits retroactive judicial ratification of the seizure of evidence of other offenses if the evidence was obtained by a legal interception. This provision completely and totally ignores the holding of the Supreme Court in *Marron* prohibiting "seizure of one thing under a warrant describing another" (275 U.S. at 196). Were the *Marron* limitations to be ignored, all searches and seizures would verge on the general, so long as the initial entry was legitimate there would be no reason to stop the search even after the described items had been seized, since everything else that was found could be used in a subsequent prosecution. (*Warden v. Hayden*, 387 U.S. 294 (1967), is not in opposite since the "mere evidence" seized there was not testimonial).

The findings required by subparagraph (3) of 2518 do not require a judge to find based on the facts stated

in the application that a certain number of days or hours is needed to obtain the authorized objective of the interception. Thus the court does not determine the scope of the search. This violates *Berger*, *Katz* and *Osborn*, and the Fourth Amendment to the United States Constitution. In *Osborn v. United States*, 385 U.S. 323 (1966), there was a specific finding that there was probable cause for coverage of one meeting. When the recording equipment failed a new finding of probable cause was required before a new order was issued. Chapter 119 requires the applicant to state the period of time during which the interceptions are to be made but nowhere therein is there to be a finding by the Court based upon facts in the application as to the duration of the interception.

Paragraph (5) of Section 2518 does state that the order may not authorize an interception for any period longer than is necessary to achieve the objective of the authorization. This, however, under present procedure, can only be determined *after* the interceptions have terminated. Therefore "the deliberate impartial judgment of a judicial officer . . . (is not) imposed between the citizen and the police . . ." *Katz v. United States*, 389 U.S. 347, 357 (1967). The most important finding, the proper scope of the search, is not determined until the interception has been terminated. Nor is judicial supervision of the interception mandatory. Without such supervision the executing officers decide when to stop the interception. Thus the scope of the search is determined by the officers conducting it, contrary to the dictates of *Berger*, *Katz*, *Osborn*, and *Marron*, *supra*.

The lack of the requirement for particularity in the warrant authorizing the eavesdropping or wire tapping

pursuant to Chapter 119 is constitutionally fatal to the said law. Instead of the more meticulous particularity for electronic eavesdropping that is unquestionably required by *Berger*, Chapter 119 contains less particularity than is usually imposed to secure the conventional search warrant.

B. Fourth and Fifth Amendments — Testimonial Evidence

Although *Warden v. Hayden*, 387 U.S. 294 (1967), abrogated the distinction between mere evidence and instrumentalities, fruits of crime, or contraband, the conceptual change of the Fourth Amendment therein contained in no way affected the prohibition in the Fourth and Fifth Amendments for a search for evidence that is solely "testimonial" or "communicative" in nature. As stated by Justice Brennan in his majority opinion for the Court:

> "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826. *This case does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.*"

As stated by Justice Douglas in his dissent in *Warden v. Hayden, supra*, "that which is taken from a person

without his consent and *used as testimonial evidence* violates the Fifth Amendment." (387 U.S. at 320).

Since the repudiation of the mere evidence rule in *Hayden* only affected *non-testimonial evidence*, all of the prior case law rejecting the use of *testimonial evidence* seized by way of a search warrant reflects the law that this Court must follow. The allowance of the seizure of testimonial evidence by Chapter 119 is clearly in violation of this law.

A search warrant cannot be used solely to gather testimonial evidence. "In this regard the Fourth and Fifth Amendments run almost into each other." *Boyd v. United States*, 116 U.S. 616, 630 (1886); *Gouled v. United States*, 255 U.S. 298 (1921).

This rule of law presents specific problems for the orders allowing the interception of wire or oral communications as set forth in Chapter 119. The interception of such communications is authorized by Section 2516, Chapter 119, "when such interception may provide or has provided evidence of" certain enumerated crimes.

Through prior understandings of earlier decisions relating to the exclusion of mere evidence from material permissibly seizable have recently been refined by the Supreme Court, *Schmerber v. California*, 383 U.S. 757 (1966); *Warden v. Hayden*, 387 U.S. 294 (1967), the Fifth Amendment privilege still applies to wiretaps taken in accordance with Chapter 119. As was said in *Schmerber*, the privilege protects an accused from providing the State (or Government) "*with evidence of a testimonial or communicative kind.*" (384 U.S. at 761). Thus, even if

the Fifth Amendment does not bar the seizure of clothing or blood, as in *Hayden* and *Schmerber*, it bars the seizure of conversations as much as it bars the seizure of private papers.

The real aim of the *Boyd-Gouled* doctrine preventing searches for "mere evidence" is the search itself. "[L]imitations upon the fruit to be gathered tend to limit the quest itself", said Judge Learned Hand in *United States v. Poller*, 43 F.2d 911, 914, (2nd Cir., 1930). Eavesdropping or wiretapping is necessarily an all-encompassing search. The words the police wish to hear may be said in the bedroom or bath, office or elevator, at noon or midnight, or by anone who happens to use the particular phone. Even if the State is entitled to those words, however, "They cannot be reached, except by a thorough search of all that the offender has [or says], to allow which would be to countenance exactly what the [Fourth] Amendment was designed to prevent." *United States v. Kirschenblatt*, 16 F.2d, 202, 204 (2nd Cir., 1926). Learned Hand, J.).

In *Gouled v. United States, supra*, at 304, the Supreme Court observed that the Fourth and Fifth Amendments:

> "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of court or by well-intentioned but mistakenly over-zealous executive officers."

Once the Fourth and Fifth Amendments apply, it follows that the statements overheard, which are of a testimonial and communicative nature and which are seized solely for their evidentiary value, cannot be used in evidence against a defendant in that they contravene the constitutional guarantee of the said amendments.

C. First Amendment Violations

The First Amendment to the Constitution of the United States declares that "Congress shall make no law . . . abridging the freedom of speech." This applies equally to the States. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). No constitutional right has suffered more frequent attack by governmental officials than the right of free speech; and in no other area has the Supreme Court of the United States so consistently turned back these attacks.

The dimensions of free speech, the most basic of our freedoms, have not been fully kenned, however. As is often the case, the nature and quality of a freedom are not understood until that freedom is endangered. Individual freedom of expression is not mere political debate. It is not limited to the public forum. First Amendment freedoms are not confined to those which fit a literal category of speech, petition or assembly. *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Bridges v. California*, 314 U.S. 252, 269 (1941). The First Amendment creates "penumbral" freedoms of association, communication and individuality, *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958); *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557 (1963), and a "zone of

privacy" which gives that freedom "life and substance". *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Freedom of speech includes the freedom to hold oneself apart from the public scene and speak freely while speaking privately—to withdraw to a private place (one's own or another's) where the individual can ease the lines of his public face and posture, and without fear that he is being watched:

> ". . . open his collar . . . and give vent to his own particular daydreams, his mutterings and snatches of crazy song, his bursts of obscenity and afflatus of glory." Cahn, *The Sense of Injustice*, 151 (1949).

" 'Privacy' is not merely a personal predilection; it is an important functional requirement for the effective operation of social structure." Merton, *Social Theory and Social Structure*, 375 (1957); see also pp. 343-346.

A secretly installed microphone or a wiretap necessarily deprives those within its range of this freedom.

Chapter 119 purports to authorize such secret interception of wire or oral communications, upon issuance of a Court order, if the court finds certain matters from the application. (See 18 U.S.C. 2518(a) thru (d)) This statute in view of such allowance, clearly imposes a certain restraint on free speech.

In *On Lee v. United States*, 343 U.S. 747 (1952); *Lopez v. United States*, 373 U.S. 427, 439 (1963); *Hoffa v. United States*, 385 U.S. 293 (1966); and *Osborn v.*

United States, 385 U.S. 323 (1966), the Supreme Court of the United States held that the police might obtain recordings of statements by use of a microphone hidden on the person of one whom the defendant knew was present. This Honorable Court was not presented with First Amendment arguments in those cases. Whether upon reconsideration in First Amendment terms these cases would be decided differently is not necessary to now determine. In those cases the persons whose statements were recorded knew of the presence of the person who carried the listening or recording apparatus. Even if those who speak must assume the risk, under the *On Lee-Osborn* line of cases, that the person in whose presence they speak may divulge what is said to them, it does not follow that they must also risk that others, to whom they have not knowingly spoken, by secret listening devices will also have heard what is said. The method of eavesdropping authorized by Chapter 119 creates for every person everywhere the possibility that his statements are being listened to, no matter how faithfully those to whom he speaks keep his confidences. This tears at the very fabric of human relationships; the selection of those to whom one will communicate.

In a broad sense the statute in question has a legitimate end: to assist law enforcement officers in the prevention of crime, and to bring to the bar of justice and punish those who engage in criminal conduct. Legitimate ends alone, however, will not justify legislation which impinges on the full exercise of the right of free speech. *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940).

Section 2518 of Chapter 119 purports to authorize this impingement on free speech anytime the judge to

whom application is made finds "probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in Section 2516 of this chapter." This impingement on free speech is not restricted to situations concerning grave and immediate danger which is authorized by Chapter 119, Section 2518, subsection 7(a) and (b), or situations concerning the national security, Chapter 119, Section 2510, subsection 3. As was said in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943), "[F]reedoms of speech [and other First Amendment freedoms] . . . are susceptible of restriction only to prevent *grave and immediate* danger to interests which the State may lawfully protect." (Emphasis added).

Some might contend that any crime creates a "grave and immediate" danger to the public interest, thereby permitting the restraint of free speech that eavesdropping represents upon such a showing. This, however, ignores two vital points. First, restraining free speech, through eavesdropping or any other means, is permissible, if at all, only when there is a likelihood that a crime of great seriousness such as kidnapping, murder or matters affecting the national security, is involved. In the words of the Supreme Court in *Thomas v. Collins*, 323 U.S. 516, 530 (1945):

> "[W]hatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in *public danger*, actual or impending. *Only the gravest abuses*, endangering paramount interests, give occasion for permissible limitations." (emphasis added)

This statute would permit eavesdropping in situations without any such grave danger by authorizing applications for interception for virtually every federal or state offense. See Section 2516. Almost any crime will do. Second, the statute does not authorize eavesdropping to assuage a grave danger or prevent any crime at all. It merely seeks to authorize eavesdropping to gather evidence of crime. This is a total failure to provide a sufficient basis for trenching upon the Constitutional rights of citizens of the United States.

Undoubtedly, statutes can be drafted which, by the enumeration of purposes sufficiently related to vital public interests, and by the incorporation of the appropriate procedural safeguards of the Fourth Amendment and limitations on the use of the conversations overheard (e.g., see *Massiah v. United States*, 377 U.S. 201, 207 (1964)), can withstand the tests of the First, Fourth, and Fifth Amendments.[1]

The modern developments in electronic eavesdropping are well known. Any telephone can be quickly transformed

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[1]On February 6, 1967, former President Johnson, in his message to the Congress on crime, recommended enactment of legislation which would

> "outlaw all wiretapping, public and private, wherever and whenever it occurs, as well as all willful invasions of privacy by electronic devices such as radio transmitters and concealed microphones. *The only exceptions would cover those instances where the security of the Nation itself is at stake—and then only under the strictest safeguards.*" (H.R. Doc. No. 53, 113 Cong.R., H. 985, 989; S. 1517, 1520 (daily ed. Feb. 6, 1967).) (Emphasis added).

Legislation of the kind proposed by the former President would comport with the requirements of the First Amendment which are urged here.

into a microphone which transmits every sound in the room—even when the receiver is on the hook. Tiny microphones can be secreted behind, or even in, a picture, with a transmitter buried in the frame.

When such eavesdropping is systematically engaged in by the police it has special impact upon free discussion. Since Orwell's *1984*, men have feared the totalitarian impact of unremitting official invasion of privacy, which, it can be expected, will always be supported by arguments of necessity. For the historical example of Nazi Germany, see Shirer, *The Rise and Fall of the Third Reich*, 273 (1960). Official eavesdropping places the spectre of the government agent at the right hand of every individual everywhere—for there is no way of knowing when a conversation is being overheard. All who express their quiet aspirations, dreams, hopes, plans, foibles of personality—and conspiracies—risk that these are being shared with officials unknown to them or to their confidants.

The indiscriminate intrusiveness of a "bug" that can catch every intimate, irrelevant or privileged utterance of each person in the room or area bugged; or the inevitable equivalent results of a continuous tap on a telephone which picks up all conversations of everyone who talks on the line whether the subject calls out from the tapped number, into that number, or is called by someone using that phone, most severely restricts the constitutional rights of free speech of American citizens. Because these devices intrude so deeply and so grossly, they clearly must have the effect of discouraging people from speaking freely. As Justice Brennan has warned, if these devices proliferate widely, we may find ourselves in a society where

the only sure way to guard one's privacy "is to keep one's mouth shut on all occasions." *Lopez v. United States*, 373 U.S. 427, 450 (1963). See also Kalven, *Privacy in the Year 2000* in *Symposium, Toward the Year 2000: Work in Progress*, Daedalus 876, 882 (1967).

To disregard the chilling effect these new electronic eavesdrop "weapons in the war on crime" have on innocent people is to allow free speech to become a casualty of that "war". It would avail society nothing if in an attempt to secure our citizens from crime we took from them the security of private free speech.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of April, 1975, a copy of the above Petition for Writ of Certiorari, was mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. and to Martin Steinberg. United States Department of Justice, 111 N.W. 5 Street, Miami, Florida.

I FURTHER CERTIFY that all parties required to be served have been served.

ALAN E. WEINSTEIN

APPENDIX

APPENDIX A

United States Court of Appeals, Fifth Circuit.

Nos. 71-2948, 71-3192.

UNITED STATES of America, Plaintiff-Appellee,
v.

Martin SKLAROFF and Jesse Sklaroff,
Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellee,
v.

Martin SKLAROFF, Jesse Sklaroff, and Barney Tillman Berry, Defendants-Appellants.

Jan. 17, 1975.

First and second defendants were convicted before the United States District Court for the Southern District of Florida, at Miami, Cabot, J. (Deceased), and William O. Mehrtens, J., of violating statute prohibiting the transmission of wagering information and first, second and third defendants were convicted before the United States District Court for the Northern District of Georgia, Newell Edenfield, Chief Judge, of conspiracy to violate statute prohibiting transmission of wagering information and on substantive counts charging violation of the statute. The defendants appealed and the appeals were consolidated. The Court of Appeals, Bell, Circuit Judge, held that the

evidence was sufficient to support the convictions; that there was no error with respect to issuance of warrant to search third defendant's business premises; that the third defendant was not prejudiced by corrected charge on voice identification; that the statute prohibiting the transmission of wagering information included the recipient of information in the bookmaking business which assists in the placing of bets and wagers; that the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 which authorize wire interceptions are constitutional; that the procedures used in obtaining the interception order were not deficient; that the order itself was not legally insufficient and that the Government did not fail to comply with requirements of the order once it was obtained.

Affirmed.

1. Telecommunications — 363

Evidence was sufficient to support convictions for use of a wire communication facility for the transmission in interstate commerce of bets or wagers and of conspiracy to transmit wagering information. 18 U.S.C.A. § 1084.

2. Gaming — 60

Warrant to search third defendant's Atlanta, Georgia, premises used in the business of bookmaking was properly issued. 18 U.S.C.A. § 1084.

3. Criminal Law — 818

Where trial court corrected its charge as to the issue of voice identification after objection by third defendant's

counsel, possible prejudice to third defendant was obviated by the corrected charge in prosecution for transmission of wagering information. 18 U.S.C.A. § 1084.

4. Telecommunications — 362

Statute, providing that whoever being engaged in the business of betting or wagering knowingly uses the wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitled recipient to receive money or credit as result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be subject to fine and imprisonment, embraces the recipient of information in the bookmaking business which assists in the placing of bets and wagers. 18 U.S.C.A. § 1084.

5. Telecommunications — 492

Provisions of the Omnibus Crime Control and Safe Streets Act of 1968 which authorize the interception of wire communications are constitutional. 18 U.S.C.A. §§ 2510-2520; U.S.C.A.Const. Amends. 1, 4, 5.

6. Telecommunications — 496

Where application for authorization to intercept wire communications contained clear description of the four telephones, including a diagram of their location at Miami International Airport, clerical errors in one digit in one telephone number and in exchange number "691" being

stated as "961" as to another of four telephone numbers did not render the application deficient. 18 U.S.C.A. §§ 2510-2520.

7. Telecommunications — 496

Record in prosecution for unlawful interstate transmission of wagering information by use of wire communication facility established that federal agents had probable cause to intercept telephone conversations, that there was no deficiency from the standpoint of particularity as to description of conversations to be intercepted, the duration of the intrusion or a showing of need for the interceptions and that other investigative procedures appeared to be unlikely to succeed. 18 U.S.C.A. §§ 1084, 2510-2520.

8. Telecommunications — 496

Where the Government accounted for delay of 14 days in delivering recordings of wire interceptions to the judge issuing the interception order by showing that the recordings remained in the FBI evidence room for seven days and that the additional seven days were used in the preparation of search warrants, here was no showing that the integrity of the interceptions was in any way violated and there was no showing of prejudice to the defendants, the Government did not violate wiretap statute by failing to deliver immediately the recordings of the interceptions to the judge issuing the interception order at the end of the period of the order. 18 U.S.C.A. §§ 2516(1), 2518, 2518 (8)(a).

9. Telecommunications — 496

Purpose of provision of wiretap statute requiring the Government to deliver immediately the recordings of the interceptions to the judge issuing the interception order at the end of the period of the order is to safeguard the recordings from editing or alteration. 18 U.S.C.A. § 2518(8)(a).

10. Telecommunications — 496

Order, which authorized interception of telephone conversations, was not invalidated because it was represented to the issuing judge that the application had been authorized by named Assistant Attorney General, whereas the application had been authorized by the Attorney General, nor was the order invalidated by the failure to advise the issuing judge that a deputy Assistant Attorney General, in an authorized ministerial act, had signed the Assistant Attorney General's name. 18 U.S.C.A. § 2516(1).

Appeals from the United States District Court for the Southern District of Florida and the Northern District of Georgia.

Before WISDOM and BELL, Circuit Judges, BREWSTER, District Judge.

BELL, Circuit Judge:

Defendants Martin and Jesse Sklaroff were convicted in the Southern District of Florida on charges of violating

18 U.S.C.A. § 1084.[1] They were also convicted in the Northern District of Georgia, along with defendant Berry, of conspiring to violate § 1084, and on substantive counts charging violation of § 1084.

The essence of the charges was the business of bookmaking and the use of the telephone by the Sklaroffs to transmit information assisting in the placing of bets and wagers to Berry and a co-defendant Dudley in Atlanta, and to others in cities outside Florida. (Dudley later pleaded guilty.) The appeals from these convictions were consolidated and we now affirm the convictions.

There are some assignments of error common to the three defendants. These center on telephone conversations intercepted by wiretaps. The sufficiency of the evidence is also drawn into the question by all defendants. In addition, Berry claims error with respect to the issuance of a search warrant, the court's charge on the question of voice identification, and the court's construction of § 1084 to include the recipient of information by transmission which assists in placing bets and wagers.

[1-3] Assuming the admissibility of the evidence procured by and through the wire interceptions, to be dis-

[1] § 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

cussed hereinafter, there is no merit whatever in the contention that the evidence was insufficient to warrant the convictions of the defendants. We also find no error with respect to the issuance of the warrant to search Berry's business premises in Atlanta. See United States v. Ventresca, 1965, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684. After objection by Berry's counsel, the trial court corrected its charge as to the issue of voice identification and we hold that any possible prejudice to Berry was obviated by the corrected charge.

[4] There is no merit in the contention that § 1084 does not include the recipient of information in the bookmaking business which assists in the placing of bets and wagers. Berry relies on United States v. Stonehouse, 7 Cir., 1971, 452 F.2d 455 but see United States v. Sellers, 5 Cir., 1973, 483 F.2d 37, where we aligned our court with Sagansky v. United States, 1 Cir., 1966, 358 F.2d 195; and Tomeo v. United States, 10 Cir., 1972, 459 F.2d 445, in holding that the statute embraces the recipient in the transmission process.

The central questions presented are in connection with wire interceptions. United States District Judge W. O. Mehrtens authorized FBI agents to intercept telephone conversations between the Sklaroffs and others originating from four specified pay telephones located in the public area of the Miami International Airport. The interceptions were authorized for a period of seven days from the date of the order.

These telephones were allegedly being used by the Sklaroffs for the transmission in interstate commerce of bets and wagers, and of information assisting in the placing of bets and wagers in violation of 18 U.S.C.A. § 1804.

In addition to intercepting the conversations, one FBI agent was concealed in a refrigerator crate near the four telephone booths, and was able to take motion pictures of the Sklaroffs from that vantage point. There is little dispute in the proof as to use of the telephones by the Sklaroffs and the times involved. Many calls were intercepted and some of these led to Berry and Dudley in Atlanta.

[5] It is first urged that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-2520, is unconstitutional. The argument for unconstitutionality is that (1) wire interceptions authorized by the Act are so inherently broad and the intrusions allowed so indiscriminate as to necessarily violate the Fourth Amendment; (2) an order authorizing the interception of wire communications is for the purpose of obtaining testimonial evidence of crimes and therefore violates the Fourth and Fifth Amendments; (3) the interceptions authorized by the Act violate First Amendment rights of free speech; (4) the interceptions authorized constitute a search and thus a defendant is entitled to notice prior to entry, and (5) the Act is unconstitutional in that it authorizes interceptions without probable cause being established. Taken together, it is said that it is impossible to have a constitutionally valid statute authorizing wire interceptions.

The arguments made in support of the claim that the statute is unconstitutional have been addressed by one or more of our sister circuits and, without exception, they have upheld the constitutionality of the Act. See, e.g., United States v. Tortorello, 2 Cir., 1973, 480 F.2d 764; United States v. Cafero, 3 Cir., 1973, 473 F.2d 489; United States v. Bobo, 4 Cir., 1973, 477 F.2d 974; United States v. Cox, 8 Cir., 1972, 462 F.2d 1293; Cox v. United States, 10 Cir., 1971, 449 F.2d 679. One teaching of Berger v. New

York, 1967, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040; and Katz v. United States, 1967, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, is that a statute permitting wire interceptions under narrow restrictions and carefully circumscribed conditions may be constitutional. We join in holding that Title III, §§ 2510-2520, meets the test of Berger and Katz.

The defendants also urge that the procedures used in obtaining the interception order were deficient; that the order itself was legally insufficient; and that the government failed to comply with the requirements of the order once it was obtained.

[6] One alleged defect or deficiency in the application for the order is said to lie in the fact of an error in one digit in one telephone number, and in exchange number 691 being stated as 961 as to another of the four telephone numbers. This argument is made in the face of a clear description of the four telephones including a diagram of their location. This is no more than a clerical error and is entirely without substance.

[7] We likewise find no deficiency from the standpoint of probable cause, particularity as to description of the conversations to be intercepted, or the duration of the intrusion. The Act also requires a showing of need for the interceptions and that other investigative procedures appear to be unlikely to succeed. We find that this requirement was met.

[8, 9] The assertion that the government violated § 2518(8)(a) by failing to deliver immediately the recordings of the interceptions to the judge issuing the interception order at the end of the period of the order, is without

merit. There was a delay of fourteen days. There was no showing of prejudice to the defendants in the delay. The purpose of this provision of the statute is to safeguard the recordings from editing or alteration. There was no showing that the integrity of the interceptions was in any way violated. The government accounted for the delay by showing that the recordings remained in the FBI evidence room for seven days and that the additional seven days were used in the preparation of search warrants.

Indeed, we have carefully considered the facts obtaining to the interceptions from beginning to end in light of the requirements of § 2518. There was substantial compliance with the requirements on the part of the government and the authorizing judge.

[10] The last question to be considered is the claim that the application for the interception order was not authorized in accordance with 18 U.S.C.A. § 2516(1). It was represented to the issuing judge that the application had been authorized by Assistant Attorney General Wilson. It developed that it was authorized by the Attorney General. This circumstance did not invalidate the subsequent order authorizing the interceptions. Nor was it invalidated by the failure to advise the issuing judge that Deputy Assistant Attorney General Petersen, in an authorized ministerial act, had signed Wilson's name. United States v. Chavez, 1974, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380. See also United States v. Bobo, supra, 477 F.2d at 984; United States v. Cox, supra, 462 F.2d at 1297-1300.

We have carefully considered every assignment of error. The appeals are without merit.

Affirmed.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 71-2948
NO. 71-3192

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARTIN SKLAROFF and JESSE SKLAROFF,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARTIN SKLAROFF, JESSE SKLAROFF and
BARNEY TILLMAN BERRY,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING

[Filed March 4, 1975]

Before WISDOM, and BELL, Circuit Judges and BREWSTER, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing on behalf of Martin Sklaroff and Jesse Sklaroff filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 71-2948

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARTIN SKLAROFF and JESSE SKLAROFF,
Defendants-Appellants.

[Filed March 18, 1975]

ON CONSIDERATION OF THE APPLICATION of the appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including April 3, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed

with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Griffin B. Bell

UNITED STATES
CIRCUIT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 71-3192

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARTIN SKLAROFF, JESSE SKLAROFF and
BARNEY TILLMAN BERRY,
Defendants-Appellants.

[Filed March 18, 1975]

ON CONSIDERATION OF THE APPLICATION of the Martin Sklaroff and Jesse Sklaroff in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Martin Sklaroff and Jesse Sklaroff to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including April 3, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the

Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Griffin B. Bell

UNITED STATES
CIRCUIT JUDGE

APPENDIX E

CHAPTER 119 — WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 112.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any elec-

tronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operation of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2)(a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: Provided, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the com-

munication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213.

§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 214.

§ 2514. Immunity of witnesses

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimnoy or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that informtion would be in violation of this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attornay General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy

Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation or stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense invloving bankruptcy fraud or the manufacture, importation, receiving, concealment,

buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 217.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify

his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communications has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the pur-

poses for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure

pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move

to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218.

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 222.

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 223.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1249

MARTIN SKLAROFF AND
JESSE SKLAROFF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners allege that the district court's failure to date fully a wiretap order rendered it invalid under 18 U.S.C. 2518, that the cumulative effect of several alleged violations of the wiretap statute denied them due process, and that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2518, is unconstitutional in violation of the First, Fourth, and Fifth Amendments.

Petitioners were convicted by a jury in the United States District Court for the Southern District of Florida on six counts of interstate transmission of wagering information, in violation of 18 U.S.C. 1084. They were also convicted by a jury in the United States District Court for the Northern District of Georgia of conspiracy to transmit wagering information interstate, in violation

of 18 U.S.C. 371, and (Martin Sklaroff on five counts, Jesse Sklaroff on two) of interstate transmission of wagering information, in violation of 18 U.S.C. 1084.[1] The Fifth Circuit consolidated the appeals on defendants' motion, and affirmed in both cases (Pet. App. A-1; 506 F.2d 837).

The undisputed evidence established that petitioners conspired to use and used the telephone to transmit from Florida to Georgia information which assisted in the placing of bets and wagers.[2] The prosecution's evidence in both the Florida and the Georgia case were derived from a single wire interception authorized by Judge Mehrtens of the United States District Court for the Southern District of Florida.

1. Petitioners contend first that the evidence derived from the wiretap should have been suppressed because of an incomplete date on the intercept order. The order authorized wire interception for a period of seven days

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[1]In the Florida case, Martin Sklaroff was sentenced to two years' imprisonment on each of counts one and two, the sentences to run consecutively, and two years' imprisonment on each of counts three through six, the sentences to run concurrently with one another but consecutively to the sentences on counts one and two, for a total of four years' imprisonment. Jesse Sklaroff was sentenced to two years' imprisonment on each of the six counts, the sentences to run concurrently. In the Georgia case, petitioners were sentenced to three years on the conspiracy count and one year on each of the substantive counts, to run concurrently with one another but consecutively to the sentence on the conspiracy count, for a total of four years' imprisonment.

[2]In the Georgia case, co-defendant Elmer H. Dudley pleaded guilty and co-defendant Barney Tillman Berry was convicted by the jury. The court of appeals affirmed Berry's conviction along with that of petitioners (Pet. App. A-1 to A-10); Berry has not filed a petition for a writ of certiorari.

from the date of the order. Judge Mehrtens inadvertantly omitted, however, the month and year of the date, although the day of the month was specified, thus: "this 17th day of " (Pet. 11). In an order denying a pre-trial motion to suppress Judge Mehrtens amended the intercept order *nunc pro tunc* to read "this 17th day of June, 1969," to correspond with the facts (Supp. App. below 94-95).

It was also established at the suppression hearing that the intercept order was delivered to the agent in charge of the investigation outside the courtroom within minutes after it was signed by Judge Mehrtens; that the intercept equipment was installed on June 18, 1969; that the interception commenced on June 19, 1969; and that the intercept ended on June 24, 1969 (*id.* at 97, 243-247, 253-257). On July 8, 1969 the intercept order, as well as the application, the affidavit, and the tape recordings of the intercepted conversations were returned to Judge Mehrtens and were sealed (*id.* at 35-37).

Although the court of appeals did not explicitly treat petitioners' claim that the incomplete date rendered the intercept order void, the contention was considered and rejected by four district court judges.[3] Their rulings were correct and no further review is warranted.

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[3]In the United States District Court for the Southern District of Florida, Judge Mehrtens denied a pre-indictment civil motion to suppress the evidence derived from the wiretap; Judge Cabot subsequently denied a similar motion made before trial in the criminal case. 323 F. Supp. 296. In the United States District Court for the Northern District of Georgia much the same motions were made and denied, respectively, by Judge Smith and Judge Edenfield. (Supp. App. below 93; *Dudley* v. *United States*, 320 F. Supp. 456, appeal dismissed as premature, No. 29382, May 13, 1970 (C.A. 5).)

A mistake made in the dating of an order such as the one here in question is no more than a clerical error subject to subsequent correction. When, as here, there is no dispute as to when a search warrant was issued and executed, the incomplete dating of the warrant may be rectified later and is not grounds for suppression of evidence seized pursuant thereto. *United States* v. *Matellian*, 31 F.R.D. 233, 234 (D. Mass.); *United States* v. *Hertel Athletic & Social Club, Inc.*, 25 F.2d 872, 873 (W.D. N.Y.); cf. *Flanagan* v. *United States*, 179 F.2d 703 (C.A. 6).

Indeed, Rule 36, Fed. R. Crim. P., expressly provides for such corrections: "Clerical mistakes in * * * orders * * * arising from oversight or omission may be corrected by the court at any time * * *." An error in the date of an intercept order is "a typical example of a clerical error" under this Rule. *United States* v. *Ceraso*, 355 F. Supp. 126, 128 (M.D. Pa.) (holding an *unsigned* intercept order invalid). Petitioners do not contest the facts as to when the order was signed and executed; nor do they assert any prejudice from the incomplete date or from the *nunc pro tunc* amendment. Under these circumstances Judge Mehrtens' subsequent correction of the date was effective under Rule 36 fully to rectify the initial omission in the order.

Petitioners' contention that the order was void because it authorized a wiretap of limitless duration is incorrect. The order specified that the interception was to be limited to seven days from the 17th. There could have been no doubt in the minds of the United States Attorney, the FBI agents, or the court as to which month and year were intended. The FBI agents received the intercept order on the 17th of June, 1969, within minutes after it was signed. Furthermore, since the

order was returned to the district judge for sealing on July 8, 1969, it could not possibly have been used in justification of interceptions beginning on the 17th of any other month or year. In short, there was no showing that the lack of specificity in the order permitted or led to abuse. See *United States* v. *Kahn*, 415 U.S. 143, 154-155. On the contrary, the evidence is undisputed that the FBI agents complied strictly with the seven day duration of the order.[4]

2. Taken alone or in combination, petitioners' remaining objections to the admission of the wiretap evidence against them do not show violation of due process or of "the Congressional intent" (Pet. 14) behind enactment of the federal wiretap statute.

a. Petitioners say that the application submitted to Judge Mehrtens was void because, although it accurately listed petitioners' telephone numbers, the letter from Assistant Attorney General Wilson to the United States Attorney, authorizing the application, listed the numbers incorrectly (691-9566 for 691-9561, and 961-9797 for 691-9797) (*id.* at 14-15). The court of appeals correctly

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[4]Petitioners' contention that such a finding conflicts with the ruling of the Sixth Circuit in *United States* v. *Lamonge*, 458 F. 2d 197, 199, is incorrect. In *Lamonge* the intercept orders contained neither year, month, nor date, and therefore by their terms authorized interception for any eight-day period beginning on a date wholly unascertainable from the face of the order. Intercepting agents, not knowing when the eight-day period actually commenced, might in complete good faith exceed the intended duration of such an order. In the instant case the date of commencement appeared on the order with sufficient specificity to obviate such a danger.

See also *United States ex rel. Rosner* v. *Warden*, 378 F. Supp. 1064 (S.D. N.Y.), rejecting a claim based on *Lamonge* that an intercept order was invalid because the "effective date" was not specified, although the order itself was dated. The court said that in *Lamonge* "the order was *undated*. Here the order bore the date of its issuance and it will be presumed to mark the beginning of the period prescribed." *Id.* at 1068 (emphasis in original).

found this claim "entirely without substance" (Pet. App. A-9). Furthermore, the actual authorization for the application came from the Attorney General (*id.* at A-10), whose memorandum informing Wilson of the authorization contained the correct telephone numbers (App. below 2694).

b. Petitioners contend next that the application for the intercept order was defective because the attached affidavit was not sworn to by the agent who wrote it. The application itself, however, which incorporated in abbreviated manner the facts set out in the attached affidavit, was sworn to before Judge Mehrtens by the attorney presenting it (Supp. App. below 199-209, 258-259). The attorney was familiar with the facts and circumstances set forth in the affidavit since he had closely supervised the agent who had written it and conducted the investigation (*id.* at 221-222); he was thus able to swear to reliable hearsay information known to the agent. Cf. *Whiteley* v. *Warden*, 401 U.S. 560, 568; *United States* v. *Ventresca*, 380 U.S. 102; *Rugendorf* v. *United States*, 376 U.S. 528, 533; *Jones* v. *United States*, 362 U.S. 257, 269. The requirement of both the Fourth Amendment and 18 U.S.C. 2518(1) that the warrant issue only upon oath or affirmation was therefore satisfied.

c. The court of appeals in the following words (Pet. App. A-9 to A-10) properly rejected petitioners' contention that the evidence should have been suppressed because of a two week delay in delivering the recordings to the issuing judge for sealing:

> The assertion that the government violated §2518 (8)(a) by failing to deliver immediately the recordings of the interceptions to the judge issuing the interception order at the end of the period of the order, is without merit. There was a delay of four-

> teen days. There was no showing of prejudice to the defendants in the delay. The purpose of this provision of the statute is to safeguard the recordings from editing or alteration. There was no showing that the integrity of the interceptions was in any way violated. The government accounted for the delay by showing that the recordings remained in the FBI evidence room for seven days and that the additional seven days were used in the preparation of search warrants.

See also *United States* v. *Falcone*, 505 F. 2d 478, 483-484 (C.A. 3), certiorari denied, February 24, 1975, No. 74-5619; *United States* v. *Poeta*, 455 F. 2d 117, 122 (C.A. 2), certiorari denied, 406 U.S. 948.

3. Petitioners' last contention, that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is unconstitutional, has been rejected by every court of appeals that has considered the issue. Title III fully meets the constitutional requirements set out in *Berger* v. *New York*, 388 U.S. 41, and *Katz* v. *United States*, 389 U.S. 347. See *United States* v. *Ramsey*, 503 F. 2d 524, 526-531 (C.A. 7), certiorari denied, February 18, 1975, No. 74-5517; *United States* v. *Martinez*, 498 F. 2d 464, 467-468 (C.A. 6), certiorari denied, 419 U.S. 1056; *United States* v. *James*, 494 F. 2d 1007, 1012-1013 (C.A. D.C.); *United States* v. *Tortorello*, 480 F. 2d 764, 771-775 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Bobo*, 477 F. 2d 974, 981-982 (C.A. 4), certiorari denied *sub nom. Gray* v. *United States*, April 14, 1975, No. 73-231; *United States* v. *Cafero*, 473 F. 2d 489, 496 (C.A. 3), certiorari denied, 417 U.S. 918; *United States* v. *Cox*, 449 F. 2d 679, 683-687 (C.A. 10), certiorari denied, 406 U.S. 934.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.